Federal Court  Cour fédérale

Date: 20170228

Docket: IMM-3230-16

Citation: 2017 FC 245

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 28, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

DERIA UWITONZE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

DECISION AND REASONS

I. Background

[1] The applicant is from Burundi. In June 2008, she left Burundi to go to the United States on the pretext of participating in a student exchange with the Global Youth Institute in Iowa. At the time, she had a U.S. visa and a Burundian passport issued in the name of Deria Girukwishaka, born on November 23, 1990.

[2] On July 22, 2008, she entered Canada and claimed refugee protection under the name Deria Uwitonze, born on January 23, 1990. She provided three (3) identity documents in this name: a Burundian national identity card, a Burundian student card and a birth certificate.

[3] Questioned by a Canada Border Services Agency (CBSA) officer on July 25, 2008, the applicant stated that the passport in the name of Deria Girukwishaka was stolen in New York. She was then arrested and detained pending identification.

[4] While the applicant was in custody, a CBSA counterfeit analyst produced an expert report on the three (3) identity documents submitted by the applicant. On August 4, 2008, the analyst found that the three (3) documents did not contain "any significant signs of alteration," but that the results of the analysis were "inconclusive" in the absence of a comparison specimen.

[5] On August 18, 2008, the applicant was placed on conditional release without her true identity having been determined.

[6] On May 10, 2011, the Refugee Protection Division (RPD) rejected her refugee claim. It did not find the applicant's testimony credible, including with respect to the price and procedures for obtaining a Burundian identity card. While acknowledging that she was a Burundian national, the RPD found that the applicant's true identity was Deria Girukwishaka, not Deria Uwitonze. An application for judicial review of this decision was dismissed by this Court on January 17, 2012.

[7] In November 2011, the applicant filed an application for permanent residence on humanitarian and compassionate grounds. Her application was allowed in the first step of the process in March 2013. In order to confirm that her identity was actually Deria Uwitonze, she produced several other documents including a laissez-passer replacing a passport issued by the Embassy of Burundi in Canada, school report cards, a certificate of family composition and several affidavits.

[8] On July 20, 2016, an immigration officer denied the application on the basis that the applicant failed to prove her identity conclusively and because she did not submit prescribed documents pursuant to subsection 50(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).

[9] The applicant is seeking judicial review of this decision.

II. Analysis

[10] The applicant claims that the immigration officer's decision was unreasonable and in violation of the rules of natural justice. She also criticizes the officer for being biased.

[11] It is well established that reasonableness is the standard for reviewing an immigration officer's decision to grant relief on humanitarian and compassionate grounds *(Kanthasamy v. Canada (Citizenship and Immigration*), 2015 SCC 61 at para. 44). The assessment of the applicant's identity, the evaluation of the evidence and the determination of what constitutes a prescribed document within the meaning of subsection 50(1) of the IRPR raise either questions

of fact, mixed questions of fact and law or questions of law within the jurisdiction of an immigration officer (*Demiri v. Canada (Citizenship and Immigration*), 2014 FC 1104 at para. 12; *Andryanov v. Canada (Citizenship and Immigration*), 2007 FC 186 at para. 14).

[12] However, when issues of natural justice or procedural fairness are involved, including those involving allegations of bias, the more stringent standard of correctness must be applied (*Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12 at para. 43; *Mission Institution v. Khela,* 2014 SCC 24 at para. 79). The question in this case is not really whether the decision was "correct," but rather whether the process followed by the decision-maker was fair (*Majdalani v. Canada (Citizenship and Immigration),* 2015 FC 294 at para. 15).

[13] Although the applicant raised several arguments, only one is needed to dispose of this application for judicial review. As a result, the Court does not intend to rule on the other arguments.

[14] In her decision, the officer noted that the applicant's national identity card was analyzed by a counterfeit analyst and that the results of the analysis were inconclusive because there was no comparison specimen. The officer then indicated that she examined the original document and observed that the date of birth was erased and that this correction was clearly visible on the copy. Her observations led her to conclude that the document had been altered. She also noted that the applicant's national identity card bore the same number as the one on her brother's national identity card issued two (2) years earlier. The officer found that it was unlikely, on a

preponderance of the evidence, that the two (2) cards would bear the same number, and therefore asserted that the authenticity of the national identity card was dubious.

[15] The applicant criticized the officer for not having told her that she had doubts as to whether the national identity card might have been altered. She contended that the officer should have given her the opportunity to answer her questions.

[16] The respondent argued that the officer was under no obligation to inform the applicant of her doubts. He pointed out that the applicant was aware that the authenticity of her national identity card raised doubts since the CBSA officer at the port of entry had also noted that the date of birth appeared to have been changed. The respondent added that the officer could certainly see that the document in question had been altered, notwithstanding the findings of the expert report completed by the CBSA's counterfeit analyst. Finally, the respondent argued that the applicant had the burden of proving her identity and could see that the document had been corrected and that the numbering was identical on the two (2) cards.

[17] The Court agrees with the respondent that it is incumbent upon the applicant to provide the officer with convincing evidence to confirm her identity (*Lhamo v. Canada (Citizenship and Immigration),* 2016 FC 873 at para. 28; *Bah v. Canada (Citizenship and Immigration),* 2013 FC 14 at para. 33). The officer is not required to notify the applicant of inadequacies in her application nor in the material provided in support of the application (*De La Cruz Garcia v. Canada (Citizenship and Immigration),* 2016 FC 784 at para. 12). Nor is she required to provide the applicant with an opportunity to dispel any doubts or concerns when the material provided in

support of her application is unclear, incomplete or insufficient (*Rani v. Canada (Citizenship and Immigration)*, 2015 FC 1414 at para. 17 [*Rani*]; *Kuhathasan v. Canada (Citizenship and Immigration)*, 2008 FC 457 at para. 37 [*Kuhathasan*]; *Hassani v. Canada (Citizenship and Immigration*), 2006 FC 1283 at para. 24).

[18] However, it is well established that where an immigration officer's doubts involve the credibility, accuracy or authenticity of the information provided by an applicant in support of her application, including the authenticity of documents produced by an applicant, the immigration officer must inform the applicant and give her an opportunity to address them (*Mursalim v. Canada (Citizenship and Immigration*), 2016 FC 264 at para. 16; *Rani* at para. 18; *Kuhathasan* at para. 37).

[19] The Court is of the view that in the circumstances of this case, the officer should have informed the applicant of the doubts she had with respect to the authenticity of her national identity card and given her the opportunity to address them.

[20] The Court recognizes, as the respondent argues, that the CBSA officer at the port of entry questioned the applicant about her identity card on July 25, 2008, the date on which the applicant was detained pending identification. The officer asked her why the date of birth on the identification document appeared to have been changed. The applicant replied that she did not know and that she went to get it at the Bujumbura city hall "maybe" the year before.

[21] However, the counterfeit expert assessment ordered on July 29, 2008, the results of which were verbally communicated to the applicant while she was in detention, was not called into question by the RPD in its decision. Rather, the RPD's finding with respect to the national identity card was based on the applicant's lack of knowledge of the price and procedure for obtaining such a card. Given the counterfeit analyst's findings and the basis for the RPD's finding, it was reasonable for the applicant to believe that the issues involving the alteration of her identity card were no longer a concern when she made representations regarding her application for permanent residence.

[22] With respect to the officer's doubts regarding the identical numbering on the applicant's and her brother's national identity cards, there is no indication that this concern was raised with the applicant in order to give her an opportunity to provide an explanation in this regard.

[23] The officer could certainly have communicated her concerns to the applicant regarding the authenticity of her national identity card as she did with regard to the school report cards filed by the applicant. On March 10, 2016, the officer sent the applicant a fairness letter containing the results of the verification of her school report cards and called her for an interview on April 1, 2016, to give her an opportunity to provide an explanation in this regard. The fairness letter makes no mention of the officer's concerns about the national identity card or of her doubts as to its authenticity.

[24] The Court is of the opinion that the officer's finding as to the authenticity of the applicant's national identity card gave rise to the obligation of procedural fairness. The officer

should have given the applicant a reasonable opportunity to respond to the doubts she had about the authenticity of the national identity card.

[25] The Court further considers the breach of procedural fairness in this case to be significant. The officer's finding that the laissez-passer replacing a passport is not a prescribed document under subsection 50(1) of the IRPR is based, at least in part, on the fact that the laissez-passer was obtained with the applicant's national identity card, the authenticity of which is in doubt. It is impossible for the Court to know whether the officer's decision would have been different had her doubts about the identity card been dispelled.

[26] In addition to being procedurally unfair, the officer's decision regarding the authenticity of the national identity card is also unreasonable because it lacks transparency, justification and intelligibility, according to the requirements set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Although she did mention twice in her decision that the counterfeit analyst indicated the test results were inconclusive in the absence of a comparison specimen, the officer failed to specify that the expert also asserted that the examination of the identity card with a microscope and a video spectral comparator did not reveal any significant signs of alteration.

[27] In addition, the officer did not provide any reason to disregard the expert's findings regarding the absence of significant signs of alteration. She merely alleged that the date of birth was erased and corrected on the original document and drew her own conclusions. However, the CBSA's counterfeit analyst was able to make this same observation and did not mention it in his report.

[28] Finally, even if the Court does not intend to rule on the other arguments raised by the applicant, the Court deems it necessary to point out that the officer failed to mention in her decision two (2) affidavits produced by the applicant: her sister's affidavit and that of a friend who knew her both in Burundi and Canada. In the two (2) cases, the affiants confirmed the applicant's identity as Deria Uwitonze and attached a photo of the applicant to their affidavits.

III. Conclusion

[29] In summary, the Court finds that the officer should have informed the applicant of her concerns about the authenticity of her national identity card. In failing to do so, she breached her duty of procedural fairness. Her decision is also unreasonable as shown in the paragraphs above. For these reasons, the application for judicial review must be allowed and the matter referred to another officer for reconsideration.

[30] The applicant proposes that the Court certify several questions. The defendant is opposed. Given that the Court finds that it is not necessary to rule on the other arguments raised by the applicant, there is no need to certify the questions (*Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9; *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at para. 12; *Pierre v. Canada (Citizenship and Immigration)*, 2012 FC 1249 at paras. 46-47).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review be allowed;
2. The decision rendered on July 20, 2016, is set aside and the case is referred to another immigration officer for reconsideration of the application;
3. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3230-16
STYLE OF CAUSE:	DERIA UWITONZE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 8, 2017
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	FEBRUARY 28, 2017

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